Filed 3/30/10 P. v. Mattox CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CLAUDE DAVE MATTOX, JR., Defendant and Appellant.	B213001 (Los Angeles County Super. Ct. No. KA082178)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Claude Dave Mattox, Jr., appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of first degree burglary (Pen. Code, § 459), and defendant admitted ten prior serious or violent felony convictions (*id.*, §§ 667, subds. (a), (b)-(i), 1170.12). The trial court sentenced defendant to state prison for an indeterminate term of 25 years to life, plus a determinate term of 15 years for three prior serious felony convictions.

On appeal, defendant contends he was prejudiced by comments the trial court made to the jury, the trial court abused its discretion in refusing to strike two of his prior convictions, and his sentence constitutes cruel and unusual punishment. We affirm.

FACTS

On February 23, 2008, Candace Roy (Roy) was showing two prospective renters an apartment in a converted garage in her back yard. When she got the keys to the apartment, she noticed that there were only two keys on the ring, instead of three. As she walked toward the closed door to the bathroom, she heard a male voice say, "Someone's in here." She and the prospective renters left the apartment.

Roy called the current tenant, Michelle Macario (Macario), and asked if she had any guests staying there. The tenant said she did not. Roy then asked a friend and a neighbor to come with her to the apartment. Roy knocked on the door and defendant opened it.

Defendant was Roy's stepbrother. She had given him permission on previous occasions to enter the apartment to do repair work. He walked outside and handed Roy a key to the apartment. He reached into his pocket and took out three rings, which he gave to Roy.

Roy put the rings in the apartment. Macario subsequently confirmed that the rings were hers. She said it looked like someone had gone through her things in the apartment.

DISCUSSION

Reference to "Discussions Between the Parties"

Prior to voir dire, the trial court spoke to the prospective jurors about the nature and importance of jury duty. It explained that "when something not so nice happens in your community and there is a lawsuit or there's a prosecution, those concerns end up in a courtroom like this, and I as a judge cannot resolve those matters in some instances without the participation of people like yourself."

The court then went on to explain that it had a criminal case before it, which meant "that a criminal charge has been lodged by the prosecution against an individual on the basis of a belief that that individual has violated the law, that he has committed a criminal—violated a criminal statute. *There's been discussions between the parties. There's been judicial input, and the parties still find themselves apart. For that reason, I need 12 of you and two alternates to sit and listen and try to resolve this case.*" (Italics added.)

The court went on to explain the presumption of innocence in a criminal case, the purpose of a charging document, and the prosecution's burden of proving guilt beyond a reasonable doubt.

In defendant's view, the italicized language informed the jurors that there had been failed plea negotiations in the case. This undermined the presumption of innocence and thus was unconstitutional. In support of his position, defendant relies on a case from Texas (*Blue v. State* (Tex.Crim.App. 2000) 41 S.W.3d 129, 130) and one from the Ninth Circuit (*U. S. v. Galindo* (9th Cir. 1990) 913 F.2d 777, 779) for the proposition that such comments are prejudicial because jurors would assume that only a guilty defendant would engage in plea negotiations.

First, as the People point out, defendant failed to object to the trial court's comment. This forfeits any claim of error on appeal. (*People v. Monterroso* (2004) 34 Cal.4th 743, 759; cf. *People v. McWhorter* (2009) 47 Cal.4th 318, 373.)

Second, assuming arguendo the trial court's comment was erroneous, the error was harmless beyond a reasonable doubt. The comment was followed immediately by an explanation of the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt, giving the prospective jurors little if any time to make the connection between "discussions" and failed plea negotiations indicating guilt.

Finally, as our Supreme Court has observed, "it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case." (*People v. Medina* (1995) 11 Cal.4th 694, 741; accord, *People v. Seaton* (2001) 26 Cal.4th 598, 636.) At that point, the prospective jurors have not been selected for the jury and have not begun to focus their attention on the task before them. (*Seaton, supra*, at p. 636; *Medina*, *supra*, at p. 741.)

References to an "Experienced Prosecutor" and the Jury System as a "Check and Balance"

After discussing the presumption of innocence and burden of proof, the trial court discussed the criminal justice system. It told the jury about police procedure when a crime has been reported. Then, "[a]n *experienced prosecutor* will review" the materials presented by the police and make a decision as to whether to file charges. (Italics added.) If charges are filed, there is a preliminary hearing at which a judge decides "whether there's sufficient cause to have [the accused] person stand trial. Now, mind you, the judge doesn't decide guilt or innocence. The burden of proof is not proof beyond a reasonable doubt but just probable cause to believe that the person committed the crime."

The court then explained that while everyone would like to believe that law enforcement, prosecutors and judges are diligent in the performance of their duties, "we live in a criminal justice system that says it's not a good idea" to have these people decide guilt or innocence. "Rather, we will leave these questions to citizens like yourself. [¶] The jury system is a *check and balance against government*. It's intended as a protection from government. So rather than relying and hoping that law enforcement's done their job and that judges have done their job, those witnesses that were initially

interviewed [after the report of a crime], we're going to bring them here so that you can see and hear what they have to say and you can make up your own mind as far as their credibility." (Italics added.)

Defendant contends the foregoing comments diminished the jury's role, eroded the presumption of innocence and lessened the prosecution's burden of proof. He claims that "[b]y informing the jury of these prior determinations by others in the criminal justice system, the court created a risk that jurors would fully or partially abdicate their responsibility to evaluate [defendant's] guilt in favor of accepting the conclusions of the police, the prosecutor, and the preliminary hearing judge."

As with the previous comment, defendant forfeited his claim of error by failing to object below. (*People v. Monterroso, supra,* 34 Cal.4th at p. 759; cf. *People v. McWhorter, supra,* 47 Cal.4th at p. 373.) Any risk that the prospective jurors would misinterpret the trial court's comments as defendant suggests was dissipated by the fact they occurred prior to voir dire. (*People v. Seaton, supra,* 26 Cal.4th at p. 636; *People v. Medina, supra,* 11 Cal.4th at p. 741.)[1]

Refusal to Strike Defendant's Prior Convictions

Defendant had 10 prior convictions of serious or violent felonies within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). In 1980, he was convicted of four counts of robbery and one count of attempted robbery (*id.*, §§ 211, 664). In 1981, he was convicted of possession of a deadly weapon by a prisoner (*id.*, § 4502). In a separate case in 1981, he was convicted of six counts of robbery and one count of attempted robbery (*id.*, §§ 211, 664). He also was convicted of involuntary manslaughter (*id.*, § 192, subd. (b)), which is not a serious or violent felony for Three Strikes purposes.

---

[1] Inasmuch as we reject both of defendant's claims of error, his claim of cumulative error also must be rejected. (*People v. Phillips* (2000) 22 Cal.4th 226, 244.)

Defendant was paroled at the beginning of 1987. At the end of 1987, his parole was suspended and he was convicted of two counts of kidnapping and one count of second degree robbery (Pen. Code, §§ 207, 212.5, subd. (c)). He was paroled in July 1999 and arrested again in May 2000. His parole was revoked and then reinstated in July 2000. He was discharged from parole in July 2002.

Defendant moved to strike his prior convictions on several grounds, including that his current offense was relatively minor, he was over 50 years old, his prior convictions were over 20 years old, and his current offense resulted from a relapse into alcohol use after years of sobriety. At the sentencing hearing, his counsel argued that it would be a "tragedy" to put defendant in prison for the rest of his life because his alcoholism caused him to slip and he committed the current offense. Defendant's daughter and mother addressed the court regarding his years of sobriety and the good work he had done in that time, and they asked the court for leniency.

The prosecutor then pointed out that during much of the time since defendant's last conviction, defendant was incarcerated. Defendant's prior offenses involved violence. The prosecutor urged the court to impose a Three Strikes sentence based on defendant's criminal history.

Defendant then addressed the court. He thanked the court for the opportunity to complete a program while awaiting trial, took responsibility for his actions, and told the court he would accept whatever sentence the court gave him.

The trial court told defendant it was fortunate that he had "become enlightened," but it was unfortunate that it "came so late in the game." The court noted it "has discretion, but discretion has its limits. Your history in the criminal justice system is horrendous."

The court initially stated that it was going to sentence defendant to prison for the high term of 6 years, doubled to 12, and it was going to strike three strikes in three prior cases. The prosecutor then pointed out that there were actually 10 prior convictions in the three cases and asked if the court was striking nine of those convictions, the only way defendant could be sentenced as if this was a second strike. The trial court reviewed the

record on defendant's prior convictions, and then stated, "Upon further review of the prior package, the court is of the view that it would abuse his discretion in striking the priors. The[y] are just too numerous and too serious."

Defendant contends that the trial court would not have abused its discretion in striking nine of his ten prior convictions. Recognizing that the fact that it might not have been an abuse of discretion to strike the prior convictions under the circumstances does not establish an abuse of discretion in refusing to do so (see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978), defendant contends, in the alternative, that the trial court abused its discretion in refusing to strike his prior convictions.

In reviewing a claim of abuse of discretion, "we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

In the context of the Three Strikes law, we note that the purpose of the law is "'to restrict courts' discretion in sentencing repeat offenders.'" (*People v. Carmony*, *supra,* 33 Cal.4th at p. 377.) To effectuate this purpose, "'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme."' [Citation.]" (*Ibid.*)

For this reason, there are "stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385[, subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

Stated otherwise, "the law creates a strong presumption that any sentence that conforms to [the Three Strikes law's] sentencing norms is both rational and proper." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Therefore, only in limited circumstances will we find an abuse of discretion in refusing to strike prior convictions in a Three Strikes situation. These include where the trial court was unaware of its discretion, where it considered impermissible factors, or where a Three Strikes sentence, as a matter of law, results in an arbitrary, capricious or patently absurd sentence. (*Ibid.*)

However, "'[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors described in [*People v.*] *Williams*[(1998)] 17 Cal.4th 148, manifestly support the striking of a prior conviction and no

reasonable minds could differ—the failure to strike would constitute an abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

In arguing that the trial court abused its discretion in refusing to strike his prior convictions, defendant puts forth the same factors he raised below: the remoteness of his prior convictions; the nine-year period of time between his release from prison and the current offense; that the current offense did not result in injury or loss to anyone; his age; and that he had lived successfully in the community, had been employed, had family support and was amenable to counseling. As the trial court implicitly acknowledged, all of these factors support an exercise of discretion to strike all but one of defendant's prior convictions and sentence him as a second strike offender.

However, as the trial court ultimately realized, defendant had not a few but 10 prior serious or violent felony convictions. He had lived successfully in the community only since July 2000. He was not discharged from parole until July 2002, having spent the previous 22 years either in custody or under supervision. In comparison with his lengthy criminal history, the relatively brief period of time defendant lived free from contact with the criminal justice system does not compel a finding that defendant should be treated as though he "falls outside the spirit of the three strikes scheme" (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378). (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338-340, and cases cited therein.)

As noted in *People v. Strong*, *supra*, 87 Cal.App.4th at page 338, "the overwhelming majority of California appellate courts have . . . affirmed the refusal to dismiss[] a strike of those defendants with a long and continuous criminal career. [Citations.]" They are "'the kind of revolving-door career criminal[s] for whom the Three Strikes law was devised.'" (*Id*. at p. 340, fn. omitted.) The types of mitigating factors or lack of aggravating factors that defendant cites here, relating to the present offense, do not necessarily remove defendant from the letter or spirit of the Three Strikes law. (*Id*. at pp. 343-346.)

In light of defendant's long and continuous criminal record, sentencing defendant to a long term in state prison under the Three Strikes law did not result in a miscarriage of

justice, even in the presence of mitigating factors. (*People v. Strong*, *supra*, 87 Cal.App.4th at p. 340.) That it might not have been an abuse of discretion to strike one or both of defendant's prior convictions under the circumstances does not establish an abuse of discretion in refusing to do so. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977-978.) Accordingly, the trial court did not abuse its discretion in denying defendant's request to strike nine of his prior convictions. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

Cruel and Unusual Punishment

Defendant's final contention is that, even if it was not an abuse of discretion to impose a Three Strikes sentence, the sentence is so disproportionate to the crime committed as to constitute cruel and unusual punishment.

We start our analysis of this issue by observing that California courts have consistently upheld Three Strikes sentences for nonviolent offenses such as defendant's. (See, e.g., *People v. Meeks* (2004) 123 Cal.App.4th 695, 710; *People v. Murphy* (2001) 88 Cal.App.4th 392, 394; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094.) Courts have observed that recidivism in the form of the repeated commission of felonies poses a clear danger to society. It justifies the imposition of longer sentences for subsequent offenses. (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) "The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within

the discretion of the punishing jurisdiction." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [100 S.Ct. 1133, 63 L.Ed.2d 382].)

In *Lockyer v. Andrade* (2003) 538 U.S. 63 [123 S.Ct. 1166, 155 L.Ed.2d 144], defendant was convicted on two counts of petty theft with a prior conviction. He had three prior burglary convictions. He received a Three Strikes sentence of 50 years to life. (*Id*. at p. 68.) The United States Supreme Court observed that under "'clearly established Federal law, as determined by the Supreme Court of the United States,'" a sentence violates the Eighth Amendment proscription against cruel and unusual punishment if it is grossly disproportionate. (*Id*. at p. 71.) The court concluded that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case. In applying this principle . . . , it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison." (*Id*. at p. 77.)

Similarly, in *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179, 155 L.Ed.2d 108], the court upheld a Three Strikes sentence for a nonviolent offense, shoplifting three golf clubs worth $1,200. (*Id*. at pp. 28, 31.) In conducting a proportionality analysis, the court weighed not only the gravity of defendant's current offense "but also his long history of felony recidivism." (*Id*. at p. 29.) It noted the purpose of the Three Strikes law is not merely punishing the current offense but also "'dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'" (*Ibid*., quoting from *Rummel v. Estelle*, *supra*, 445 U.S. at p. 276.) Based on defendant's recidivist history, which included a robbery and three residential burglaries, the court concluded defendant's sentence of 25 years to life was not grossly disproportionate and did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. (*Ewing*, *supra*, at pp. 30-31.)

Under *Andrade* and *Ewing*, defendant's sentence in the present case does not rise to the level of cruel and unusual punishment. That defendant's current offense was nonviolent and involved no loss or injury does not compel a different conclusion. In light

of defendant's long history of recidivism, this simply is not the "extraordinary case" in which we can find a constitutional violation based upon gross disproportionality. (*Lockyer v. Andrade*, *supra*, 538 U.S. at p. 77.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.